

## Cunningham, Michael

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**From:** Cunningham, Michael  
**Sent:** Monday, February 29, 2016 1:09 PM  
**To:** Holmes, Belinda  
**Cc:** Koesterer, Elizabeth  
**Subject:** RE: 3007 stuff from UST

Hi Belinda and Elizabeth,

I sent the US Tech 3007 info to Ohio EPA a while back and expect to hear from them sometime this week. I'll let you know as soon as they get back to me.

Mike C.

Region 5

(312) 886-4464

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**From:** Holmes, Belinda  
**Sent:** Thursday, February 04, 2016 3:17 PM  
**To:** Cunningham, Michael <cunningham.michael@epa.gov>  
**Cc:** Koesterer, Elizabeth <Koesterer.Elizabeth@epa.gov>  
**Subject:** RE: 3007 stuff from UST

Hi Mike—

Glad it went through. Really, if you or anyone else in your Region have any questions about this case, please contact Beth Koesterer at the e mail address in the cc line or at 913 551 7673. She has spent an inordinate number of hours looking over all this stuff, and knows it much better than I do.

And of course, let me know if you all get any reaction from Ohio EPA about Mr. Williams's assertions.

Thanks!

*Belinda L. Holmes, Senior Counsel*

U.S. EPA Region 7

11201 Renner Boulevard

Lenexa, Kansas 66219

Phone: 913.551.7714

Fax: 913.551.9714

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**From:** Cunningham, Michael  
**Sent:** Thursday, February 04, 2016 2:40 PM  
**To:** Holmes, Belinda <[Holmes.Belinda@epa.gov](mailto:Holmes.Belinda@epa.gov)>  
**Subject:** RE: 3007 stuff from UST

Got it! Thanks Belinda. We'll get back to you shortly.

Mike C.

Chief, RCRA Compliance Section 1

(312) 886-4464

**From:** Holmes, Belinda  
**Sent:** Thursday, February 04, 2016 2:37 PM  
**To:** Cunningham, Michael <[cunningham.michael@epa.gov](mailto:cunningham.michael@epa.gov)>  
**Subject:** 3007 stuff from UST

*Belinda L. Holmes, Senior Counsel*

U.S. EPA Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219  
Phone: 913.551.7714  
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Mike C.  
Chief, RCRA Compliance Section 1  
(312) 886-4464

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**From:** Holmes, Belinda  
**Sent:** Thursday, February 04, 2016 2:37 PM  
**To:** Cunningham, Michael <[cunningham.michael@epa.gov](mailto:cunningham.michael@epa.gov)>  
**Subject:** 3007 stuff from UST

*Belinda L. Holmes, Senior Counsel*  
U.S. EPA Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219  
Phone: 913.551.7714  
Fax: 913.551.9714

## Cunningham, Michael

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**From:** Cunningham, Michael  
**Sent:** Wednesday, February 24, 2016 4:07 PM  
**To:** Mathews, Mitch  
**Cc:** Morris, Julie  
**Subject:** Region 7 US Tech question  
**Attachments:** Region 7 US Tech Info Request.pdf

Hi Mitch,

Belinda Holmes and Beth Koesterer from Region 7 are taking a close look at the US Tech operations in several of their states, and wanted me to get Ohio's take on what the company said in the (attached) response to an Information Request sent by the Region. Specifically, Region 7 is wondering about the claims in answer number 4 on pages 2 and 3. Could you provide some insight that I could pass along?

Thanks!

Mike C.

(312) 886-4464

**Fw: Haz. Waste: U.S. District Court Says It Lacks Jurisdiction Over State's Decision That Product Is Waste**

Michael Cunningham to: Stuart Hersh

01/20/2009 04:10 PM

Good News!

----- Forwarded by Michael Cunningham/R5/USEPA/US on 01/20/2009 04:10 PM -----



Sue Brauer/R5/USEPA/US To

01/20/2009 01:43 PM

Subject Haz. Waste: U.S. District Court Says It Lacks Jurisdiction Over State's Decision That Product Is Waste

I thought you'd be interested in the story below. It's from [http://news.bna.com/deln/DELNWB/split\\_display.adp?fedfid=11343243&vname=dennotallissues&fn=11343243&jd=a0b7u7x7j3&split=0](http://news.bna.com/deln/DELNWB/split_display.adp?fedfid=11343243&vname=dennotallissues&fn=11343243&jd=a0b7u7x7j3&split=0)  
There's no BNA Daily Env. Rep. today, so I clicked on "Headline News" and found the article. It will probably be in tomorrow's publication.

Sue Rodenbeck Brauer  
U.S. EPA, Region 5 (LR-8J)  
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Chicago, Illinois 60604-3590  
phone (312) 353-6134  
fax (312) 353-4788  
brauer.sue@epa.gov

Daily Environment Report: All Issues > 2009 > January > 01/21/2009 > News > Hazardous Waste:  
U.S. District Court Says It Lacks Jurisdiction Over State's Decision That Product Is Waste

**Related Terms**

**Topics:**

*Hazardous Waste*

**Courts:**

*U.S. District Courts, Ohio*

**States:**

*Ohio*

**Federal Statutes:**

*RCRA*

11 DEN A-4

**Hazardous Waste**

**U.S. District Court Says It Lacks Jurisdiction Over State's Decision That Product Is Waste**

A federal district court ruled Jan. 13 that it lacks jurisdiction over a determination by the Ohio Environmental Protection Agency that a company's masonry blocks, which contain hazardous waste, are themselves hazardous waste, rejecting the company's lawsuit against the state agency and the U.S. Environmental Protection Agency (*US Technology Corp. v. Johnson*, S.D. Ohio, No. 08-CV-00082, 1/13/09).

The U.S. District Court for the Southern District of Ohio, citing the Resource Conservation and Recovery Act, held that because a state's federally authorized program operates "in lieu of the federal program," it is a matter of state law that can only be challenged in state court.

US Technology Corp. is a manufacturer that uses hazardous waste byproducts—which include heavy metals from old paint, including lead, chromium, and cadmium—to make "Sealtech" masonry blocks.

The Ohio EPA, operating under an EPA-authorized state hazardous waste law, determined that the Sealtech blocks become a hazardous waste when "applied to or placed on the land," which the state found to constitute "disposal."

OEPA informed US Technology that Sealtech blocks used in building foundations are waste materials "used in a manner constituting disposal." The determination was upheld by the state Environmental Review Appeals Commission and a state appeals court.

**Challenge Under State Law, RCRA.**

US Technology then filed a declaratory judgment action against EPA and the Ohio EPA, seeking an order that the Ohio EPA misapplied the state law and RCRA, on which it is based.

EPA and the state moved to dismiss for lack of subject matter jurisdiction.

The court first addressed the charges against EPA, finding that US Technology failed to establish any EPA action sufficient to establish a case or controversy.

"UST appears to contend that USEPA promulgates minimum standards for RCRA's implementation by the states, and therefore, the states are merely proxies of the federal government when implementing relevant state codes," the court said. "An analysis of the administrative regimes reveals, however, that state and the federal governments enforce their RCRA regimes independently, thus undercutting UST's contention that the states are merely proxies for the USEPA."

"The text of RCRA ... does not support UST's position that state enforcement actions under RCRA, specifically O.A.C. § 3745-266-20, necessarily implicate USEPA or federal government action. The plain language of RCRA indicates that state implementation operates 'in lieu of the Federal program.' "

The court noted that the Ohio EPA "does not enforce federal law; nor does USEPA enforce state law."

**EPA Inaction Does Not Generate Jurisdiction.**

The court also declined to adopt US Technology's argument that inaction on the part of USEPA—failure to define whether Sealtech block can be used below grade—creates a case or controversy.

"UST cites no authority for the proposition that a federal administrative agency's failure to promulgate a particular regulation somehow generates federal jurisdiction," the court said.

Turning to the allegations against the Ohio EPA, the court said, "OEPA's authorized RCRA enforcement does not involve a federal question because its program operates in lieu of federal law."

"Therefore, UST can only hold OEPA accountable for application of O.A.C. § 3745-266-20 or other sections of the Ohio Revised or Administrative Code, not its alleged application of 40 C.F.R. § 266.20 or other sections of the United States Code or Code of Federal Regulations," the court said.

"By themselves, questions regarding these state regulations are merely issues of state law."

Judge Edmund A. Sargus Jr. issued the opinion.

US Technology Corp. was represented by Laura L. Mills, with Mills, Mills, Fiely & Lucas in Wadsworth, Ohio.

EPA was represented by Jered J. Lindsay, with the U.S. Department of Justice in Washington, D.C.

The Ohio EPA was represented by Daniel J. Martin, with the Ohio Attorney General's Office, environmental enforcement division, and Brian Anthony Ball with the Ohio Attorney General's Office in Columbus, Ohio.

By Peter Hayes